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**COMMITTEE ON ENVIRONMENTAL ISSUES IN TRANSPORTATION LAW (A4006)**

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## SUPREME COURT RULES NO EIS AND NO CONFORMITY DETERMINATION REQUIRED FOR FMCSA RULES ON MEXICAN TRUCKS

On June 7, 2004 the U.S. Supreme Court ruled in a case that challenged the environmental documentation that accompanied the promulgation of rules that governed Mexican trucks crossing into the U.S. The rules were adopted by the Federal Motor Carrier Safety Administration (FMCSA) after an international arbitration panel under NAFTA called for the lifting of a Presidential moratorium. The President announced he would lift the moratorium once the appropriate regulations were adopted by FMCSA. When the rules were adopted, FMCSA published an EA which concluded that there would be minor environmental effects associated with the rules because the moratorium was the controlling order and that little discretion was vested in FMCSA. A similar conclusion was reached in relation to conformity under the Clean Air Act. Since there were practically no additional emissions associated with the adoption of the rules, no extensive conformity analysis was required. The Court agreed with FMCSA. The Court held that no EIS is required unless the Federal agency is responsible in a meaningful way for the environmental effects of its actions. The Court likened the analysis to proximate causation in tort. The Court also held that no EIS was required when it would serve no purpose. A similar analysis was used to dispense with the need for an analysis of emissions under the Clean Air Act. FMCSA simply had no control over emissions. *Department of Transportation, et al. v. Public Citizen, et al.,* No. 03-358, 2004 WL 1237361

## SUPREME COURT ADOPTS TEST FOR DETERMINING WHEN TO APPLY FOR NPDES PERMIT

On March 23, 2004 the U.S. Supreme Court ruled in a case that involved pumping floodwater over a levee. The water being discharged came from an urbanized area in Florida and contained high levels of phosphorous. The receiving stream was a wetland

associated with the Everglades. Before Florida was developed, the waters on both sides of the levee were part of the same waterbody. It was also assumed that the groundwater and surface water on both sides were practically interchangeable. The Court sent the case back for the lower courts to determine whether the waters on the two sides of the levee were "meaningfully distinct." If they are not, then no NPDES permit will be needed for discharges from one side to the other. *South Florida Water Management District v. Miccosukee Tribe of Indians, et al.,* No. 02-626, 72 USLW 4247, 3/30/04.

## LOCAL GROUP WAITED TOO LONG TO CHALLENGE SAVANNAH, GA PARKWAY INTERCHANGE

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In 1925 a roadway project known then as the "Casey Canal" was first proposed to relieve traffic congestion on surface streets in the Savannah, Georgia area. The proposal would remain just that, a proposal, until the project was renamed the Harry S. Truman Parkway and included in Savannah's transportation plan in 1968. When completed, the Truman Parkway will be an approximately 12-mile long, limited access, 4-lane divided roadway. The Parkway will allow traffic to bypass the congested areas just south of the City of Savannah. It will contain a total of 10 interchanges. Construction of the project was planned in six phases, each to be let under a separate contract. Construction on the first phase of the Parkway began in the 1980's.

One of the interchanges contained in one segment of the construction was what is known as the Montgomery Crossroads Interchange. Plaintiffs (two churches in the vicinity of Montgomery Crossroads, two individuals, and the Sandfly Community Betterment Association) challenged the EIS prepared for the project. Plaintiffs maintained that Sandfly was an identifiable community of historic significance, comprised originally as a settlement of former slaves and craftspeople. The specific bases on which Plaintiffs challenged the EIS: 1) Plaintiffs maintained that portions of the Sandfly community deserve protection under the National Historic Preservation Act (NHPA); 2) Defendants Georgia DOT and FHWA failed to identify various historic resources in the Sandfly community as required under NHPA; 3) Defendants violated NEPA because they failed to provide sufficient notice of the proposed construction project and conduct public hearings *within the Sandfly community;* 4) Defendants failed to consider the indirect effects arising from the change in the land-use pattern; and 5) Defendants failed to explore all reasonable alternative alignments for the project.

The case was first brought in the Northern District of Georgia (Atlanta) where the Court granted a TRO to stop all construction on the interchange. Upon motion of Georgia DOT and FHWA the case was then transferred to the Southern District of Georgia, in Savannah, where the Court granted defendants' motions to dissolve the injunction previously granted and for summary judgment. In so doing the Court discussed the meaning of Area of Potential Effect (APE) as that term is used in the EIS process, the meaning of "historic property" under NHPA, and the meaning of "adverse effects."

In reaching its final conclusion, the court determined that the plaintiffs waited too long to complain about the adequacy and accuracy of the EIS. The EIS process for the first

phase of the Truman Parkway was commenced in 1975 and completed in 1977. The project was then placed on hold until the first phases of construction began in 1990. The EIS for the phase of construction at issue in this case began in 1994. The draft EIS was completed in 1996, was revised, and was set out for public hearing in 1997. Thereafter, a bald eagle's nest was found in the direct path of the selected alignment, and the EIS document was not finalized until 1999. Construction began in 2001. Plaintiffs brought this action in 2003.

The full caption for the case is *Sandfly Community Betterment Association, Inc. v. FHWA and Georgia DOT,* U.S. District Court, Southern District of Georgia, Case No. CV 403-156. Opinion issued December 18, 2003.

## FAST-TRACKED VERMONT HIGHWAY PROJECT GETS SIDE-TRACKED

In 1982 Congress earmarked funds for a demonstration project in Vermont. The demonstration was supposed to show how to reduce the time needed to complete a highway project. The road, a circumferential road around some fast growing towns, has been built in pieces since then and opened as a two lane road with access control. Seventeen years after the State approved construction, FHWA adopted the State's EIS as its own and did a reevaluation which determined the EIS was still good. The project was also included on the White House list of transportation projects that merited expedited environmental approval. The whole process of adoption and updated approval was challenged by local opponents. On review the District Court found that the alternatives analysis in the old EIS was "not legally inadequate," but that the analysis of secondary and cumulative impacts was practically non-existent. The analysis required under Section 4f was inadequate because there was no way of knowing if there were no feasible and prudent alternatives to the use of a farm that served as a public park. The reevaluation was titled an EA, but it did not contain an analysis of alternatives. The section of road that was being currently considered for construction was not improperly segmented from the rest of the project. The discussions of water quality, air quality and noise impacts in the old EIS were not significantly changed in the reevaluation so no supplement was needed for these subjects. The analysis of environmental justice could be reviewed under the APA, but the analysis of jobs shifting away from low income areas as a result of the project was adequate. The reevaluation had a sufficient analysis of secondary impacts from the perspective of where the future growth would occur but was inadequate when it came to where population and resources would be drained away as a result of the project. Once again, the discussion of cumulative impacts was no better in the reevaluation than it was in the old EIS so a supplement was needed on this point. *Senville, et al. v. Peters, et al.,* No. 2:03-cv-279, May 10, 2004.

## FTA MUST PAY ATTORNEY FEES FOR SETTLEMENT AND NEW EIS, BUT BUFFALO, NY AGENCIES DON'T PAY

FTA provided funding for a transit project that included land on the waterfront that included the western terminus of the Erie Canal. When a portion of the original Erie Canal was discovered in excavation for the project, prior orders in favor of the objectors were vacated and an agreement was entered. The agreement called for a new EIS to be prepared from scratch. The objectors then moved for and received fees under the National Historic Preservation Act. They felt it would be easier to get fees under this Act than it would under NEPA and the Equal Access to Justice Act. On appeal the Court

held that the objectors had "substantially prevailed" under the Historic Act because even though the previous litigation was dismissed, there was a threat of further injunctive relief if no new EIS had been prepared which "effectuated a substantive, material alteration in the legal relationship of the parties." Ordering a new EIS was considered relief under the Historic Act because the NEPA process had been merged with the regulations under the Historic Act. The local agencies were not liable for fees because all of the obligations under the Historic Act fall on federal agencies. *Preservation Coalition of Erie County v. FTA, et al.,* 356 F. 3d 444 (2nd Cir. 2004).

## OLD GOAL TO INCREASE TRANSIT RIDERSHIP NOT AN ENFORCEABLE ELEMENT OF CALIFORNIA BAY AREA SIP

In 1982 the Metropolitan Transportation Commission (MTC), the Metropolitan Planning Organization for the Bay Area in California, adopted a transportation control measure (TCM) as part of its SIP to achieve the ozone standard. The TCM called for the MTC to support the transit agencies' plans to increase productivity with a target of increasing ridership by 15%. When the target was not reached, a citizens group sued claiming that the TCM target was an enforceable element of the SIP. On review the Court held that the target was never more than just that, a target. By agreeing to establish the target, MTC had not promised to attain the target. Since the Court based its decision on the plain language of the TCM, it was not persuaded by a contrary opinion from the regional office of the USEPA. *Bayview Hunters Point Community Association, et al. v. Metropolitan Transportation Commission, et al.,* 366 F.3d 692 (9th Cir. 2004)

## EIS/ROD FOR NEW RUNWAY AT LOGAN INTERNATIONAL UPHELD

After FAA approved an airport layout plan for Logan International which included a new runway, the local communities and the City of Boston challenged the decision. On review the First Circuit held that it had jurisdiction because even though the complaint concerned environmental issues, the ROD included safety issues. It was not clear from the record that FAA had been involved in the selection of the consultant to write the EIS. Even though this violated FAA's rules, there was no showing that the EIS was prejudiced or that FAA had not supervised the preparation of the EIS. The Court held that it could review the environmental justice analysis, but concluded that it was adequate because the noise was going to be no greater than it would be under the no action alternative. The project was consistent with local plans because it will not result in increased noise impacts and because the communities were involved in the decisionmaking process. *Communities Against Runway Expansion, Inc., et al. v. FAA,* 355 F. 3rd 678 (1st Cir. 2004).

## EIS/ROD FOR LOCAL ILLINOIS BRIDGE HELD SUFFICIENT

FHWA approved an EIS which authorized construction of three new bridges over the Fox River in the rapidly growing suburban area of Kane County, Illinois. Local residents challenged the approval of an alignment for one of the bridges. First the U.S. District Court reviewed the assertion that the EIS did not adequately assess the effects of traffic that would be induced to the project area by virtue of construction of the new bridge. There was not very much analysis of these impacts because they were consistent with one of the purposes of the project and because there was some evidence that these impacts were not significant. In a similar vein, there was not much analysis of the no-

build alternative because it was not consistent with the project's objectives. The analysis of build alternatives under NEPA and Section 4f was adequate because it focused on those alternatives that met the project's purposes. *Citizens Advocate Team, et al. v. USDOT, et al.,* Northern District of Illinois No. 02 C 5962, March 30, 2004.

## FHWA ISSUES LEGAL OPINION ON ADEQUACY OF LOCAL ZONING FOR OUTDOOR ADVERTISING PURPOSES

The Chief Counsel of FHWA sent an opinion letter to the State of Minnesota on April 14, 2004 on the tests it applies to determine whether local zoning is valid or whether it is sham zoning that is being done simply to allow outdoor advertising. The opinion discards strip zoning and spot zoning and zoning designations that do not allow a wide range of commercial or industrial uses. The opinion concludes that FHWA will look at the actual land uses near the parcel that has been selected for a billboard, the existence of plans for commercial or industrial development, and the availability of utilities and access roads.

## FHWA ISSUES POLICY MEMO ON 1959 "KERR AREA" BOUNDARIES

Outdoor advertising practitioners in the Bonus States know about the significance of September 21, 1959. Billboards along Interstate highways must be in areas that were inside municipal corporate limits by that date or in other areas where the land use was established by law as commercial or industrial. A question came up about areas that were unincorporated in 1959 but were subject to the extraterritorial zoning power of Omaha, Nebraska. These areas are eligible for signs if the extraterritorial zoning was commercial or industrial in 1959. If Nebraska wants to recognize any areas that did not receive the extraterritorial commercial or industrial zoning until after 1959, they may have to repay bonus funds that were paid for those respective stretches of highway.

## EIS/4F OK FOR NEW BRIDGE TO NORTH CAROLINA BARRIER ISLAND

When the North Carolina DOT and FHWA wrote an EIS and 4f statement to replace the floating one lane pontoon bridge that connected the mainland of Sunset Beach to the island of Sunset Beach, some local residents sued. This is the smallest inhabited barrier island on the North Carolina coast. The old pontoon bridge is a swing bridge which operates very slowly or frequently not at all. The replacement is set to be a high level fixed span bridge. The Court found that the EIS contained an adequate look at alternatives and secondary impacts. A bascule bridge was not a feasible and prudent alternative because it would have the same impacts on a local park as the selected bridge. *Hunt v. North Carolina DOT,* 299 F. Supp. 2d 529 (E.D.N.C. 2004)

## OREGON HIGHWAY OUTDOOR ADVERTISING LAW SURVIVES CONSTITUTIONAL CHALLENGE

An Oregon resident wanted to post a 32 square foot sign, apparently on his own property, facing a highway with the message "For Peace in the Gulf." This sign was

categorized as an off premise billboard because there were no activities on the property associated with the message. As such, the sign was not allowed. The resident sued claiming that the Oregon statute favored commercial speech over noncommercial speech by allowing businesses to advertise their on premise activities but not allowing him to express his own views. The Ninth Circuit followed its own precedent and ruled against the property owner. The on premise versus off premise distinction was upheld because it is content neutral. There was a vigorous dissent. *Lombardo v. Warner,* 353 F.3d 774 (9th Cir. 2003)

## UTAH DOT CAN CONDEMN LAND TO CREATE A NATURE PRESERVE

When the Utah DOT got permission from the Army Corps of Engineers to fill wetlands to construct the Legacy Parkway, the permit was conditioned on the creation of the Legacy Nature Preserve. The pertinent statute allows for the condemnation of property necessary for state transportation purposes. The term "state transportation purposes" includes mitigation from the effects of highway construction. This statute was invoked to take property from a landowner for both highway construction and mitigation. The property owner challenged Utah DOT's authority. The Utah Supreme Court held that the taking fit into the statute and the statute was not an impermissible delegation of authority. The Court also allowed Utah DOT to use the statute to take water rights. *Utah Dept. of Transportation v. G. Kay, Inc.,* 78 P.3d 612 (2003)

## CONSISTENCY REVIEW UNDER ALASKA COASTAL ZONE PROGRAM UPHELD FOR PHASED EXPANSION OF ANCHORAGE INTERNATIONAL AIRPORT

When the Ted Stevens Anchorage International Airport applied to the Corps of Engineers for a 10 year permit to fill approximately 240 acres of wetlands, the matter was referred to the State for a consistency review under the Alaska Coastal Zone Management Program. A local environmental group complained on the basis that the airport plan was not specific enough for a consistency review since it did not say exactly what was going to get built and when. They contended that the plan was not a "project" as that term is defined in the coastal zone program. On review the Alaska Supreme Court held that the plan was a "project." The Court relied on precedent from oil and gas lease cases and relied on the large amount of information submitted by the airport. The Court endorsed the State's holistic view of the whole project instead of focusing on individual segments. The airport constituted a non water-dependent conversion of habitat and wetlands so it had to meet a three part test. For the first part, the finding of significant public need for the improvement was upheld. For the second part, there were no feasible and prudent alternatives to the selected plan. The third part involved maximizing conformance to habitats standards. The Court found that the findings of compliance were reasonable. The Court also upheld the findings of compliance with earthquake standards. *Alaska Center for the Environment v. State of Alaska,* 80 P. 3d (Alaska, 2003)

## CHAIR'S CORNER

Submitted by Helen Mountford
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Plans are finalized for the 43rd Annual Legal Workshop on Transportation Law in Savannah, GA, July 17-21. Our committee is presenting two sessions. One is a NEPA/Section 4f Update and the other is on Environmental Streamlining Legislation and Initiatives. Many thanks to Fred Wagner who organized the NEPA/Section 4f session and to Robert Downie who organized the Streamlining session. I hope we will have a good turnout for entire workshop.

The workshop program and registration information is available online at http://www.trb.org/Conferences/Law/.

Our committee will meet on Tuesday, July 20, 2004 at 11:45 a.m. I hope to see many members and guests there. Please e-mail me with agenda suggestions.

## NEXT COPY DEADLINE IS SEPTEMBER 15, 2004

Please get your submissions for the October, 2004 *Natural Lawyer* into the Editor by the close of business on September 15, 2004. Please use the e-mail address or FAX number listed at the beginning of the newsletter or mail to Rich Christopher, IDOT, 310 South Michigan, Chicago, IL 60604.